Supreme Court, U. S.
FILED
FEB 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1059

In the Supreme Court of the United States

OCTOBER TERM, 1979

RAYMOND SAWYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of his conviction for failure to file income tax returns, contending that the trial court erred in admitting a government agent's report into evidence and in instructing the jury with respect to willfulness.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of failing to file timely income tax returns for 1971 and 1972, in violation of 26 U.S.C. 7203. The trial court sentenced him to concurrent one-year terms of imprisonment on each count. He was also fined $10,000 on the first count. The court of appeals affirmed (Pet. App. 2a-8a).

The pertinent facts may be summarized as follows: Petitioner is an accountant who had gross income of $63,918.84 in 1971 and $73,955 in 1972 (Govt. Ex. S-2; Tr. 43-44, 83).[1] He did not file timely income tax returns for those years and sought to excuse his actions by testifying that his failure to file was due "to his diminished capacity, stemming from a greatly impaired physical condition and his resultant deep-seated apprehension of impending death" (Pet. 5). This incapacitation allegedly ended in 1974 when petitioner's condition was diagnosed as a kidney stone by Drs. Sparberg and Lewis (Pet. 7-8). Petitioner's explanation, however, was refuted by evidence that his kidney stone was diagnosed by Drs. Sparberg and Lewis in 1971, and not in 1974 (Govt. Ex. S-1; Tr. 267, 270, 284). It was also contradicted by the testimony of another physician (Dr. Wendel) that, as of November 3, 1972, petitioner was able to play handball, squash, and paddleball without undue discomfort from a kidney disorder; by Dr. Sparberg's testimony that petitioner came to him on February 22, 1974, complaining, *inter alia*, of "tennis elblow"; and by the fact that for the year 1972, when he claimed to be incapacitated by his "deep-seated apprehension of impending death" (Pet. 5), petitioner claimed a deduction of $7,194 for business entertainment. There was, in short, substantial evidence from which a jury could have reasonably concluded that petitioner was overstating both his physical discomfort and his fears of death.

There was further evidence that in a telephone conversation with Revenue Agent Schroeder, petitioner had falsely claimed that he had filed income tax returns for 1971 and 1972 (Tr. 52-53, 66). The evidence was

[1] "Govt. Ex." refers to the exhibits introduced into evidence at trial by the government. "Tr." refers to the trial transcript.

embodied in the agent's referral report. Although the agent testified that he no longer remembered the telephone conversation, he had made notes of the conversation at the time it occurred and then incorporated those notes in his referral report, after which the notes were destroyed. The referral report was read into evidence as a past recollection recorded, pursuant to Fed. R. Evid. 803(5).

1. Petitioner claims (Pet. 10-16) that the trial court erred in allowing the agent's referral report into evidence as past recollection recorded even though the terms of Rule 803(5) were met. In support of this contention, petitioner relies on *United States* v. *Oates*, 560 F. 2d 45 (2d Cir. 1977), for the proposition that law enforcement reports that cannot qualify under the public records exception to the hearsay evidence rule (Fed. R. Evid. 803(8)(B) and (C)) may not be admitted under any other exception to the rule against hearsay evidence (Rule 802). Accord: *United States* v. *Ruffin*, 575 F. 2d 346, 356 (2d Cir. 1978); *United States* v. *Quinto*, 582 F. 2d 224, 235 (2d Cir. 1978). But as the court of appeals pointed out, *Oates* identified the loss of confrontation rights as the underlying rationale of Rule 803(8).

Congress wished to preclude the government from using a law enforcement officer's report as evidence against an accused without making the officer available for cross-examination. Here, however, that rationale does not apply because Agent Schroeder was available for cross-examination (see Pet. App. 6a, 8a). But cf. *United States* v. *Cepeda Penes*, 577 F. 2d 754, 761 (1st Cir. 1978). At all events, given the overwhelming evidence that petitioner had acted willfully in failing to file his tax returns (see page 2, *supra*), the admission of the revenue agent's referral report was at most harmless error.

2. Petitioner further argues (Pet. 16-17) that the trial court's jury instruction on willfulness was fatally defective because it did not advise that willfulness required an "evil motive." But in *United States* v. *Pomponio*, 429 U.S. 10, 11-13 (1976), this Court rejected the same contention. Indeed, the instruction given in this case was "virtually identical" (Pet. App. 3a) to the one contained in *United States* v. *McCorkle*, 511 F. 2d 482 (7th Cir.) (en banc), cert. denied, 423 U.S. 826 (1975), which this Court cited with approval in *Pomponio* (429 U.S. at 13).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

DOJ-1980-02